United States Court of Appeals

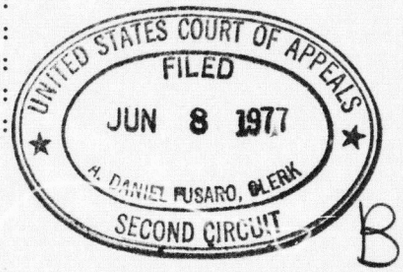
for the Second Circuit

PETITION FOR REHEARING EN BANC

77-7134 ORIGINAL

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, ET AL. Plaintiffs-Appellees - against - TRANS WORLD AIRLINES, INC., ET AL. Defendants-Appellants	Dockets Nos. 77-7134, 41



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PETITION OF APPELLANTS, TRAVELLERS AIR SERVICES, INC.,
AND TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC.,
FOR REHEARING

AND

SUGGESTION FOR REHEARING IN BANC

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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, ET AL. Plaintiffs-Appellees - against - TRANS WORLD AIRLINES, INC., ET AL. Defendants-Appellants	Dockets Nos. 77-7134, 41

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AND

SUGGESTION FOR REHEARING IN BANC

The Court's decision dismissing the appeal[1/] states a view of the Cohen doctrine[2/] which is quite different from the views of other panels of this Court in Aeromatic[3/] and Local 771.[4/] The Court's declaration of the scope of appellate jurisdiction under 28 U.S.C.

1/ Attached as Appendix A hereto.

2/ Cohen v. Beneficial Industrial Loan Corp, 332 U.S. 541, 546-47 (1949).

3/ C.A.B. v. Aeromatic Travel Corp., 489 F.2d 251, 253 (2d Cir. 1974).

4/ Local 771, International Alliance of Stage Employees v. RKO General, Inc., WOR Division, ___ F.2d ___ (2d Cir. March 3, 1977).

§1291 is also inconsistent with the Supreme Court's decisions in Local 438, Construction Laborers v. Curry, 371 U.S. 542 (1963), and Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963). Rehearing in banc is respectfully suggested to reconcile the conflicting decisions of different panels of this Circuit and to assure conformity with the decisions of the Supreme Court.

STATEMENT OF THE CASE

Background

In the last few years, the Civil Aeronautics Board ("CAB") has created by rule-making new forms of low-cost air transportation known as "advance booking" charters and "inclusive tour" charters.[5/] 14 C.F.R. Parts 371, 372a, 378, 378a. The basic theory is that a charter or tour "operator" charters aircraft from an airline. The charter/tour operator sells the chartered seats to the public either as air-only or in combination with hotels and other land arrangements as an inclusive tour. Since the charter/tour operator holds itself out to provide air transportation albeit indirectly, it is deemed to be an "air carrier", and as such requires an exemption from the certification requirements of section 401 of the Federal Aviation Act, 49 U.S.C. §1371, if the operator is a U.S. citizen. If the operator is a foreign citizen, it requires a permit issued by the CAB pursuant to section 402 of the Act, 49 U.S.C. §1372.

5/ See Trans World Airlines, Inc. v. C.A.B., 545 F.2d 771 (2d Cir. 1976); Pan American World Airways, Inc. v. C.A.B., 517 F.2d 734 (2d Cir. 1975).

This case involves the permissible relations between the chartering airline and the operator. The regulations require the charter/tour operator to be an "independent principal".[6/] The scope and meaning of "independent principal" have not been determined by the CAB. Although an airline is permitted to advertise its charter programs, the extent to which advertising and promotion may cause a charter/tour operator to no longer be an "independent principal" has not been decided. Indeed, the CAB has not clearly delineated the circumstances under which a subsidiary corporation can be an "independent principal" charter or tour operator. The CAB has ruled that foreign airlines may charter to affiliated charter/tour operators if the flight originates in a foreign country but not if the flight originates in the United States. Still pending before the CAB is the policy question of whether a U.S. airline may charter to an affiliate. The CAB's treatment of air carrier-charter/tour operator relationships are a complex of economic regulatory objectives, antitrust concepts, and relations with the international community which has different ideas than Americans have on these subjects. In addition, the entire field of charter and tour operations is being treated by the CAB as an experiment which the CAB shapes and adjusts each year in light of experience.

6/ 14 C.F.R. §§371.10(a), 378.2(b)(6).

USTOA's Crusade

A national association of independent charter/tour operators, the United States Tour Operators Association, ("USTOA"), has been conducting a multi-pronged effort to isolate airlines from the charter/tour business. For example, USTOA recently requested the CAB, unsuccessfully, to prohibit airlines from acting as operators of tours sold to passengers on scheduled flights. When TWA and Travellers Air Services, Inc. ("TAS") announced in October 1976 an extensive program of charter/tour flights, USTOA believed that TWA was too influential in the relationship and in November 1976 filed a complaint with the CAB alleging that TWA exercised economic and operational control over TAS. The CAB investigated USTOA's complaint intensively by both informal procedures as well as hearings[7/] for six months and concluded at the end of April 1977 that TWA did not control TAS.

The Instant Suit

In February 1977 USTOA brought the instant suit against TWA and TAS[8/] in the Southern District of New York alleging that TAS is not an "independent principal" within the meaning of the CAB's charter regulations. It is not clear why USTOA decided to seek the views of a judge of the Southern District of New York on one part of its general campaign against

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7/ Pursuant to 14 C.F.R. 305.

8/ USTOA also named as defendants Travellers International Tour Operators, Inc., which does not operate air charters and air tours, and "Travellers International", which does not exist.

airline involvement in the charter/tour business. Despite asseverations of need for speed, USTOA did not seek a preliminary injunction.[9/] USTOA launched a discovery effort requesting extensive document production for a seven year period involving defendants' activities in the United States and Europe.

Defendants TWA and TAS filed motions to dismiss on the ground that the CAB had primary jurisdiction of the complex issues raised by USTOA's complaint which are essentially policy questions resolvable only on a national basis by the expert agency created by Congress to regulate air transportation. The District Court (Stewart, J.) denied the motions and ordered expedited discovery which had just begun when a panel of this Court (Mansfield and Gurfein, C.JJ. and Newman, D.J.) granted a stay pending expedited appeal of the denial of the motions to dismiss.

The CAB's Participation

The Cab has played a curious role in these proceedings. As stated above, USTOA had originally filed its complaint with the CAB in November

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9/ USTOA expressly disclaimed that its members were suffering any harm from the TWA-TAS operation. USTOA's Brief stated:

> In fact, with or without the TWA/Travellers program, plaintiffs will continue to compete with scores of independent tour operators across the North Atlantic. Elimination of the TWA/Travellers program will not noticeably reduce competition. p. 27, n. 27.

It is apparent that USTOA's aim is to obtain a judicial declaration on the permissible extent of charter advertising and promotion by an airline.

1976. The CAB's Bureau of Enforcement investigated the complaint for six months. At the argument before the District Court in March 1977 on defendants' motions to dismiss, the CAB urged the District Court not to dismiss the USTOA complaint on the ground of primary jurisdiction. The District Court was clearly influenced by the CAB's representations.

When the case was argued before this Court on April 19, 1977, the CAB again urged that the USTOA complaint be retained in the federal court, stating that the CAB's investigation had been concluded and the CAB would shortly intervene as a party plaintiff. The CAB, however, did not then reveal the result of its investigation. It was not until April 29, 1977, after the case was submitted to the Court that the CAB revealed that the CAB had decided that TWA did not control TAS. The CAB said that it believed that TAS was controlled by British and Swiss interests and therefore should obtain a foreign indirect air carrier permit to authorize its operations. To that end, on April 29, 1977, the CAB filed a motion in the District Court seeking leave to intervene as a party plaintiff to allege an entirely different violation of the Federal Aviation Act from that raised by USTOA.

Subsequent to filing its motion for leave to intervene in the district court proceeding, the CAB did an amazing thing: On May 17, 1977, the CAB instituted administrative proceedings at the CAB against TAS alleging the violations it told this Court at argument on April 19, 1977, it wanted to bring in District Court. See Appendix B hereto.

The Court's Decision

On May 27, 1977, the Court entered its decision dismissing the appeal. The Court held that a denial of a motion to dismiss on the ground of primary jurisdiction is not a final decision within the meaning of 28 U.S.C. §1291. The Court held that the determination of whether an issue should be considered by an expert administrative body rather than by a court is not collateral to the merits of the action and therefore the Cohen rule does not apply.

The Court's reasoning was that in this Circuit an order staying district court proceedings under the doctrine of primary jurisdiction is not appealable, citing Allied Air Freight, Inc. v. Pan American World Airways, Inc., 340 F.2d 160 (2d Cir.) (per curiam), cert. denied, 381 U.S. 924 (1965). The Court distinguished the two subsequent decisions of this Court, Aeromatic and Local 771, which had held that orders relating to the appropriate forum are appealable under the Cohen doctrine.

ARGUMENT

I

THERE IS A SERIOUS CONFLICT BETWEEN DECISIONS OF DIFFERENT PANELS OF THIS COURT ON THE APPLICATION OF THE COHEN DOCTRINE

The Court has not concealed its view that Aeromatic and Local 771 were incorrectly decided. Under the reasoning of its instant opinion, the Court would have dismissed the appeal in Aeromatic. The right to a trial in a different forum (the CAB) is not an important "collateral" right under the Cohen rule which will be irretrievably lost unless appeal is allowed. Slip op. 3908. Moreover, primary jurisdiction is not a "right" which is recognized by the Cohen rule since it is not achieved by bargaining and embodied in a contract. Slip op. 3909.

The Court's ground for distinguishing Aeromatic was that a stay of judicial proceeding pending reference of issues to the CAB was fatal to the CAB's efforts to avail itself of the court's speedy enforcement, while in the instant case speedy enforcement continues "perhaps with the CAB as a formal party plaintiff." This consideration, although mentioned by the Court in Aeromatic, was not the touchstone of the applicability of the Cohen doctrine. Appealability does not depend on whether the plaintiff will be denied a speedy decision in his chosen forum. No such criterion can be found in Cohen or in any other case interpreting Cohen.

"Speedy enforcement" in the chosen forum is not a proper criterion to determine the appealability of a challenge to the correctness of the forum because, if the forum is ultimately found to be incorrect, the plaintiff must start again in a different forum. Prompt appellate review of the correctness of the forum results in speedier enforcement than delaying consideration of the issue until a full trial has been completed and then nullified. As an example to be avoided, consider the years which were lost in trying air carrier-common carrier control issues in the courts after which the Supreme Court held in Pan American World Airways v. United States, 371 U.S. 296 (1973), that the issues should have been tried before the CAB.

Similarly, the instant decision is in conflict with Local 771. The instant Court states that Cohen should not apply to the appealability of a stay (or denial of a stay) of arbitration but rather the matter should be determined by reference to 28 U.S.C. §1292(a)(1). Slip op. 3909, n. 6. The Court's grounds for distinguishing Local 771 limit that case to its facts to the extent that it is not overruled: Local 771 is held to a right gained by "contract". The panel deciding Local 771 made no such limitation on its holding. The Local 771 Court made clear that it was deciding on principle "that an issue regarding the right to trial in a different forum is separable from and collateral to the merits for purposes of applying the Cohen rule." Slip op. 2170. 10/

10/ The instant Court's second basis for distinguishing Local 771 is hard to understand. The Court points out that the right to avoid judicial determination of the merits would have been lost irretrievably in Local 771 if the lower court's order had not been reviewed until after the district court proceedings had run their full course. It would seem that the instant defendants' rights to avoid judicial determination of the control issues will similarly be lost irretrievably if the appeal is not heard.

The instant court has announced that this Circuit now approves the seventh circuit's decision in Thill Securities Corporation v. New York Stock Exchange, 469 F.2d 14 (7th Cir. 1972), Slip op. 3911. While Thill Securities is distinguishable from the instant case in that Thill Securities held that the issue on appeal was not separable from the merits, [11/] a panel of this Circuit in Herbst v. International Telephone and Telegraph Corp., 495 F.2d 1308, 1312 (2d Cir. 1974), expressly refused to follow Thill Securities on the applicability of the Cohen rule.

Thus, the instant decision should be reconsidered by the Court in banc. Two recent decisions by other panels of the Court have been either overruled or limited to their unique facts. There is hardly anything left of the Cohen doctrine in the Court of Appeals for the Second Circuit. [12/] If anything is left of the doctrine, it is so confused by contrary decisions that plenary consideration should be given to this case for the guidance of future litigants.

11/ The Court said,

> Nor do we believe the issue is separable from the basic antitrust issues in the case, as was the procedural issue of the security required under state statute separable from Cohen's stockholder's derivative suit. 469 F.2d at 16.

12/ What is left of the Cohen case if the issue of proper forum is not "collateral" to the merits? What issues are appealable at a preliminary stage if primary jurisdiction does not constitute an appealable "right"? If Congress' determination that the CAB should regulate, develop and promote new forms of air transportation is not a strong national policy meriting prelimirary review, how can a statute requiring security for costs support an appeal prior to decision on the merits?

II

CONFLICT WITH DECISIONS OF THE SUPREME COURT

The instant decision is inconsistent with the Supreme Court's decision in Local 438, Construction Laborers v. Curry, 371 U.S. 542 (1963), and Mercantile National Bank v. Langdeau, 371 U.S. 555 (1963). In Local 438, the Supreme Court held that whether the NLRB or a Georgia court had jurisdiction was reviewable at a preliminary stage. While the Supreme Court went on to point out that postponing review "would seriously erode the national labor policy requiring the subject matter of respondents' cause to be heard by the National Labor Relations Board, not by the state courts", (371 U.S. at 35), this was not the critical basis for applying the Cohen doctrine, as suggested by the instant Court at Slip op. 3910. The instant Court erred in elevating discussion and justification into a decisional criterion. It is incorrect that only strong federal policies are subject to the Cohen rule. What "strong federal policy" underlay Cohen itself?

In Mercantile National Bank, the Supreme Court reviewed a claim that a suit against a national bank should have been brought in a different county court in Texas. This is hardly a "strong national policy". If the venue of a suit against a bank for conspiracy to defraud is reviewable as a strong federal policy issue, the Federal Aviation Act, centralizing in the CAB the regulation and development of air transportation, is surely a "strong federal policy". Indeed, the federal policy of primary jurisdiction is itself at least as "strong" as the policy requiring a federal bank to be sued in the county where it is located or whether a litigant must post security

for costs. United States v. Western Pacific Railroad Co., 352 U.S. 59 (1956); Far East Conference v. United States, 342 U.S. 570 (1952).

III

THE CAB IS NOT SEEKING JUDICIAL ENFORCEMENT OF USTOA'S CLAIM

The Court has given substantial weight to the CAB's participation in these proceedings. The Court assumed that the CAB "supported" USTOA's efforts "to put a quick end to alleged violations of law." The Court observed that upon dismissal of the appeal, "the district court proceedings will merely continue, perhaps with the CAB as a formal party plaintiff." Slip op. 3908.

Events subsequent to submission of this case on April 19, 1977, reveal that the Court has been misled. Firstly, the CAB is not supporting USTOA's efforts. To the contrary, the CAB has concluded that USTOA's claim is invalid. The CAB's investigation revealed that TWA does not control TAS.

Secondly, to the extent the Court was influenced by the fact that the CAB had chosen the USTOA proceeding as a forum to bring its different complaint, the Court should be advised that on May 17, 1977, the CAB instituted administrative proceedings on the violations of alleged foreign control by TAS. As shown in Appendix B hereto, the CAB has commenced an administrative proceeding to compromise civil penalties. TAS has already submitted an answer to the CAB's Notice of Alleged Violations. Pursuant to 14 C.F.R. §302.805, the CAB is now considering whether the alleged violations have

been committed. The CAB's representations to this Court that the CAB is seeking judicial enforcement of its claim are no longer valid.

CONCLUSION

The Court's decision appears to eliminate the Cohen doctrine in this Circuit. If there is anything left of the Cohen doctrine, the Court should grant reconsideration and state clearly the decisional criteria and review of preliminary rulings.

By holding that the appropriateness of the forum is not a "collateral" issue within the meaning of the Cohen rule, the Court has effectively overruled the Aeromatic and Local 771 decisions. Access to this Court should not depend on the vagary of the composition of the panel hearing an appeal. Rehearing in banc should be granted to decide whether Aeromatic and Local 771 were incorrectly decided as the instant Court suggests, or whether the instant case should be brought into conformity with the views expressed by the panels deciding Aeromatic and Local 771.

Respectfully submitted,

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June 8, 1977

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1197, 1421—September Term, 1976.

(Argued April 19, 1977 Decided May 27, 1977.)

Docket Nos. 77-7134, 77-7141

UNITED STATES TOUR OPERATORS ASSOCIATION, BRENDAN TOURS, EUROPACAR TOURS, INC., ARTHUR FROMMER CHARTERS, INC., PATHFINDER CORPORATION and UNITOURS,

Plaintiffs-Appellees,

—against—

TRANS WORLD AIRLINES, INC., TRAVELLERS AIR SERVICES, INC., TRAVELLERS INTERNATIONAL TOUR OPERATORS, INC. and TRAVELLERS INTERNATIONAL,

Defendants-Appellants.

Before:

MOORE, SMITH and FEINBERG,

Circuit Judges.

Appeal from orders of the United States District Court for the Southern District of New York, Charles E. Stewart, Jr., *J.*, denying defendants' motions that sought dismissal of the complaint because primary jurisdiction rested with the Civil Aeronautics Board.

Appeal dismissed for lack of appellate jurisdiction.

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L. Cohen, of Counsel), *for Defendant-Appellant Trans World Airlines, Inc.*

ROBERT M. BECKMAN, Washington, D.C. (Beckman & Smith; Marshall, Bratter, Greene, Allison & Tucker, New York, N.Y., of Counsel), *for Defendants-Appellants Travellers Air Services, Inc., and Travellers International Tour Operators, Inc.*

RICHARD LITTELL, New York, N.Y. (Dickstein, Shapiro & Morin, Arthur J. Galligan and Barry Wm. Levine, of Counsel), *for Plaintiffs-Appellees.*

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FEINBERG, *Circuit Judge:*

Defendants Trans World Airlines, Inc. (TWA) and Travellers Air Service, Inc. (TAS) appeal from a decision of the United States District Court for the Southern District of New York, Charles E. Stewart, Jr., *J.*, denying their motion to dismiss an action brought by plaintiffs, five charter air tour operators and a trade association. The Complaint seeks injunctive relief against defendants on the ground that TWA's control over TAS, also an air tour operator, violates section 401(a) of the Federal Aviation Act of 1958, 49 U.S.C. § 1371(a).[1] In support of their mo-

1 Travellers International Tour Operators, Inc., which joined in the TAS notice of appeal, is also named as a defendant in the complaint, although its involvement in this case is not otherwise clear.

tions to dismiss, defendants argued that the Civil Aeronautics Board (CAB) had primary jurisdiction over plaintiffs' complaint. The CAB filed an amicus brief in the district court in opposition to the motions to dismiss, on the ground that the doctrine of primary jurisdiction is not applicable to the issues raised in the complaint.[2] Judge Stewart agreed, and denied defendants' motion to dismiss. They appealed, and obtained in this court a stay of all proceedings in the district court, pending disposition of the appeal.[3] We have heard argument on plaintiffs' motion to dismiss the appeal and on the merits of defendants' appeal, as well. We grant the motion to dismiss the appeal.

The order of the district court under review overruled defendants' argument that the CAB had primary jurisdiction over plaintiffs' complaint and denied their motion, based on that contention, to dismiss the complaint. The order did not dispose of the case. It did not even dispose of all the other arguments appellants made as to why the complaint should be dismissed.[4] Such an order is not ordinarily considered sufficiently final to allow an appeal from it as a matter of right. Appellants claim, however, that they may appeal under the rule established by *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546-47 (1949).

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2 The CAB, as amicus, has taken the same position before us.

3 Defendants sought the stay because they were allegedly unduly burdened by having to comply with the discovery requirements of two forums, the district court and the CAB, at the same time they litigate this appeal. The CAB brief asserts, however, that its investigation has been only "informal" and that "there is no adjudicatory proceeding pending before the CAB which could conflict with the hearing of this case by the district court."

4 E.g., failure to state a cause of action, failure to establish an agency relationship between TWA and TAS, and failure to allege any involvement of Travellers International Tour Operators, Inc. or Travellers International.

In *Cohen*, the Court held that denial of a motion to compel security for costs presented "a serious and unsettled question," which fell "in that small class which finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." 337 U.S. at 546. Attempts to come within the scope of the *Cohen* doctrine have been legion, but we have not been receptive to an expansive reading of this exception to the final judgment rule. *See, e.g., UAW* v. *National Caucus of Labor Committees*, 525 F.2d 323 (2d Cir. 1975); *West* v. *Zurhorst*, 425 F.2d 919 (2d Cir. 1970); *Donlon Industries, Inc.* v. *Forte*, 402 F.2d 935, 937 (2d Cir. 1968). The reasons for the final judgment rule, see *American Express Warehousing, Ltd.* v. *Transamerica Insurance Co.*, 380 F.2d 277, 280 (2d Cir. 1967), and our reluctance to depart from it hardly need explanation again, particularly at a time of swollen appellate dockets. We have repeatedly said that "*Cohen* may not be abused by indiscriminate extension," *UAW* v. *National Caucus of Labor Committees*, *supra*, 525 F.2d at 325, and that this exception to the usual rule of non-appealability for interlocutory orders "must be kept within narrow bounds." *Weight Watchers of Philadelphia, Inc.* v. *Weight Watchers Int'l, Inc.*, 455 F.2d 770, 773 (2d Cir. 1972).

With these considerations in mind, we turn to the issue before us. Until a few years ago, it would have been reasonably clear that defendants could not appeal from the orders here involved, in view of *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 340 F.2d 160 (2d Cir.) (per curiam), cert. denied, 381 U.S. 924 (1965). In that case, a panel of this court, including the present Chief Judge, dismissed an appeal from a district court order that stayed an antitrust action until the CAB decided

whether plaintiffs' claims fell within its primary jurisdiction. The panel pointed out, among other things, that "the stay order, as well as not adjudicating upon plaintiffs' [antitrust] claims, does not finally dispose of the district court suit or necessarily preclude a sometime trial in that forum of plaintiffs' claims." *Id.* at 161. While the case is not on all fours with the one now before us, it is similar since the legal issue on appeal was whether the doctrine of primary jurisdiction required the CAB to consider plaintiffs' claims before a court did.

Some six years later, in an unrelated case, the CAB sued various travel agencies in the federal district court, seeking injunctive relief against alleged violations of the Federal Aviation Act of 1958. The defendant travel agencies moved to dismiss or stay the district court proceedings on the ground that the doctrine of primary jurisdiction required the CAB to determine whether defendants were indirect air carriers or simply ticket agencies. The district judge granted the stay, as the judge had in *Allied Air Freight*, and the CAB appealed. A panel of this court, over a vigorous dissent by Judge Mulligan, held the order appealable under the *Cohen* doctrine because "[t]he issue of whether the doctrine of primary jurisdiction should be invoked is collateral to the ultimate issues of this case, the issue is vital to CAB efforts to secure speedy enforcement of the Federal Aviation Act and the Board's regulations, and the issue is too important to be deferred until the entire case is decided." *CAB* v. *Aeromatic Travel Corp.*, 489 F.2d 251, 253 (2d Cir. 1974). The majority opinion did not otherwise discuss the question of appealability; nor did it mention this court's decision in *Allied Air Freight, supra*, although it was the focus of the dissenting judge's opinion.

Appellants apparently believe that *Aeromatic* held that every interlocutory order involving the issue of primary

jurisdiction is per se appealable under the *Cohen* rule. Whatever the merits of the decision in *Aeromatic,* it did not go that far and in at least one respect its reasoning hurts, rather than helps, appellants' claim of appealability. In *Aeromatic,* the district court had granted the motion to stay court proceedings, a ruling which the majority thought was fatal to the CAB's efforts to avail itself of the "speedy enforcement" available only from the district court. The situation here is the reverse. Since Judge Stewart denied the motions to dismiss, the efforts of plaintiffs, supported by the CAB as amicus, to put a quick end to alleged violations of law have not been halted. If we dismiss this appeal, the district court proceedings will merely continue, perhaps with the CAB as a formal party plaintiff.[5]

Appellants argue that their right to a trial in a different forum (the CAB) is an important "collateral" right under the *Cohen* rule, which will be irretrievably lost unless they can appeal now. We do not agree that the *Cohen* rule should apply. In analogous contexts, preliminary rulings establishing the forum are not appealable, even though postponing review forces the would-be appellant to litigate in the forum he seeks to avoid, and creates the risk that an entire proceeding will be rendered nugatory. See *D'Ippolito* v. *American Oil Co.,* 401 F.2d 764 (2d Cir. 1968) (transfer to another district under 28 U.S.C. § 1404(a) not appealable). Cf. *Wilkins* v. *American Export-Isbrandtsen Lines, Inc.,* 401 F.2d 151 (2d Cir. 1968) (denial of motion to remand after removal from state court not appealable); *McKay Packers, Inc.* v. *Fireman's Insurance Co.,* 207 F.2d 955 (2d Cir. 1953) (no appeal from order remanding removed case). It is true that in *Local 771, International*

5 The CAB, both in its brief and at oral argument, affirmed its intention to move to intervene as a party in this action. After argument, the agency informed us that it has filed a motion to intervene in the district court.

Alliance of State Employees v. ***RKO General, Inc., WOR Division,*** slip op. 2163 (2d Cir. March 3, 1977), we allowed an appeal from a district court's denial of a motion to dismiss that was based on the exclusivity of the arbitration remedy. But see *Greater Continental Corporation* v. *Schechter,* 422 F.2d 1100, 1102 (2d Cir. 1970). Whatever may now be the rule regarding appeal of district court orders refusing to defer to the arbitration forum,[6] that rule does not determine the applicability of the *Cohen* rule to this case. An appellant who seeks arbitration has gained his right not to have to suffer the costs and delays of trial through contract negotiations. See *Local 771, supra,* at slip op. 2171. Appellants here can rely on no such contractual right to proceed before the CAB. And, the right to avoid judicial determination of the merits would have been lost irretrievably in *Local 771* if the lower court's order had not been reviewed until after the district court proceedings had run their full course.

Appellants' alleged "right" here to proceed before the CAB to defend a complaint brought against them by someone else is of a different sort. Appellants have not bargained to achieve that "right." Nor will it be irretrievably lost if the district court proceedings continue. Moreover, appellants' "right" to litigate before the CAB does not seem overpowering when the CAB is perfectly content to let the district court dispose of the case with the benefit of

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6 A long line of complex authority holds that "an order granting or denying a stay in a court action pending arbitration is appealable, as being analogous to an injunctive order, only when the action which is sought to be stayed is one which would have been an action at law before the fusion of law and equity." *Greater Continental Corporation* v. *Schechter,* supra, 422 F.2d at 1102, and cases cited therein. See 9 Moore's Federal Practice ¶ 110.20[3]-[4.-1], at 240-49 (2d ed. 1975). The tortuous development of this rule under 28 U.S.C. § 1292(a)(1) was unnecessary if a claim of right to a forum (arbitration) brings a case within the *Cohen* exception to § 1291.

the CAB's views. The rationale of the doctrine of primary jurisdiction is not concern for specific litigants, but rather the notion that the agencies, with their special expertise, should have the initial opportunity to develop and administer their policies consistently. See 3 K. Davis, Administrative Law Treatise § 19.01 (1958). The test for applying the primary jurisdiction doctrine is the nature of the legal issue before the court: If the question is whether the CAB rule is reasonable, the doctrine applies; it does not apply, if the issue is whether the rule has been violated. See *CAB* v. *Modern Air Transport, Inc.*, 179 F.2d 622, 624 (2d Cir. 1950). The very case appellants rely on to show appealability—*CAB* v. *Aeromatic*, supra—suggests that the primary jurisdiction issue in this case may seem "serious" to appellants, but is not that "unsettled," in the words of *Cohen*.

Appellants cite several other cases to demonstrate appealability, but they are distinguishable. *Local 438, Construction Laborers* v. *Curry*, 371 U.S. 542 (1963), and *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555 (1963), both involved the encroachment of state courts on strong federal policies,[7] and *United States* v. *Beckerman*, 516 F.2d 905 (2d Cir. 1975), concerned constitutional rights

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7 In *Local 438*, the Court reviewed the jurisdiction of a state court to issue a temporary labor injunction, in light of a challenge that the case fell within the NLRB's exclusive jurisdiction; because of the nature of labor disputes, postponing review might "render entirely illusory [petitioner's] right to review" which would "seriously erode the national labor policy" behind exclusive NLRB jurisdiction. 371 U.S. at 550. In *Mercantile National Bank*, the Court heard an interlocutory challenge to the jurisdiction of a state court because of a federal statute requiring a national bank to defend suits only where it is located. A strong federal policy was also involved in *Local 771*, supra, slip op. at 2170, which emphasized "the national labor policy in favor of . . . arbitration . . . under labor agreements."

threatened with irretrievable loss.[8] Our case more nearly resembles *Thill Securities Corporation* v. *New York Stock Exchange*, 469 F.2d 14 (7th Cir. 1972), in which the Seventh Circuit held non-appealable a district court order refusing to defer to the primary jurisdiction of the Securities and Exchange Commission. In short, we see no justifiable reason for departing from the final judgment rule, and we dismiss the appeal.

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8 In allowing Beckerman's appeal from a district court's refusal to dismiss on double jeopardy grounds, we emphasized that the "pain" of conducting a second defense is a substantial part of the justification for the double jeopardy prohibition, 516 F.2d at 906, so that review after a second trial could not fully vindicate the right.

RECEIVED
MAY 1977

CIVIL AERONAUTICS BOARD
WASHINGTON, D.C. 20428

IN REPLY REFER TO: B-52 R M B
CP-77-11

May 17, 1977

CERTIFIED MAIL

Robert M. Beckman, Esq.
Beckman & Smith
Suite 235
1001 Connecticut Avenue, N.W.
Washington, D.C. 20036

Re: Travellers Air Services, Inc., et al.

NOTICE OF ALLEGED VIOLATIONS PURSUANT TO RULE 800 ET SEQ. OF THE BOARD'S RULES OF PRACTICE.

Dear Mr. Beckman:

On April 29, 1977, the Civil Aeronautics Board filed with the United States District Court for the Southern District of New York a Motion to Intervene and for Joinder of Parties, accompanied by a Memorandum of Law and a Proposed Intervenor's Complaint, in the case of USTOA, et al., v. TWA, et al., 77 Civ 911 (CES).

In the Proposed Intervenor's Complaint, the CAB charges Travellers Air Services, Inc. (TAS), H. David Seegul, Travellers International Tour Operators, Inc., d/b/a Travellers International (TITO), Travellers International A.G. (TI), and Gerald T. Herrod with violating Sections 402(a) and 1005(e) of the Federal Aviation Act of 1958 (the Act), 49 U.S.C. §§1372(a) and 1385(e), and Sections 371.10, 378.2, and 378a.10, of the Board's Regulations, 14 C.F.R. §§371.10, 378.2, and 378a.10, by jointly engaging in foreign air transportation as a foreign air carrier without authorization from the CAB to do so.

Specifically, the CAB asserted that TAS has been advertising, selling, and operating a series of Advance Booking Charters (ABC's), Inclusive Tour Charters (ITC's), and One-Stop-Inclusive Tour Charters (OTC's) under color of compliance with the conditions of Parts 371, 378, and 378a of the Board's Regulations. However, since TAS is controlled by Mr. Herrod and TI, directly, as well as

indirectly through various devices and instrumentalities including TITO, a wholly-owned subsidiary of TI; and since Mr. Seegul, who is the president and sole stockholder of TAS and the president of TITO, is an agent, employee, and/or representative of Mr. Herrod and TI and subject to their control with respect to the operation of TAS; and since TI and Mr. Herrod are not citizens of the United States, but have been and presently are engaged, directly and/or through their officers, agents, employees, and representatives, including Mr. Seegul, TITO, and TAS, in foreign air transportation by organizing, advertising, and selling to the public, United States originating charters (ABC's, ITC's, and OTC's) without having obtained a permit issued by the CAB authorizing them so to engage; and since such actions are not in compliance with the terms of the CAB's Regulations; the above-described violations are taking place.

Since these unlawful activities serve to undermine the regulatory scheme established by Congress and administered by the CAB for the orderly regulation of air transportation activities and for the protection of the public, this letter is to notify you that, pursuant to Rule 800 et seq. of the Board's Rules of Practice, 14 C.F.R. §302.800 et seq., civil penalties will be sought against TAS, TITO, and TI, for the above-described violations of the Act and Board Regulations. Section 901(a)(1) of the Act, 49 U.S.C. §1471(a)(1), provides that a civil penalty of not to exceed $1,000 may be levied for each violation, inter alia, of any provision of Title IV of the Act or the Board's Regulations. In this case, when TAS, Mr. Seegul, TITO, TI, and Mr. Herrod are operating charters without Board authorization, as in similar such cases, the carriage of each passenger on each charter constitutes a separate violation of the above-described statutory and Regulation provisions. Since you have indicated that approximately 20,000 persons have already purchased seats on the charter programs of TAS, Mr. Seegul, TITO, TI, and Mr. Herrod, the statutory maximum civil penalty for which TAS, TITO, and TI each could be liable is, as of now, $20,000,000. * (While Rule 802(c) requires that this statutory limit be disclosed, previous Board civil penalty settlements for similar violations have been considerably less and we commend them to your attention.)

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* It should be noted that this civil penalty figure will be higher if TAS, Mr. Seegul, TITO, TI, and Mr. Herrod continue to sell their charters to additional persons, in violation of the Act and Board Regulations.

49 U.S.C. 1471(a)(2) gives the Board the power to compromise such penalties and 49 U.S.C. 1473(b) provides for the institution of actions in the Courts to collect civil penalties in the absence of compromise. Section 385.22(a) of the Board's Organization Regulations (14 C.F.R. 385.22(a)) delegates authority to the Director, Bureau of Enforcement, to "compromise any civil penalties being imposed for economic violations." Subpart H (Rule 800 et seq.) sets forth the procedure by which a compromise will be accomplished.

Pursuant to Rule 803 of the Board's Rules of Practice (14 C.F.R. 302.803), an answer to this Notice of Alleged Violations will be required within 15 days of receipt of this letter. Such answer may contain those matters which are specified in Rule 804 (14 C.F.R. 302.804).

Copies of 49 U.S.C. 1471(a) and 1473(b), as well as Subpart H of the Rules of Practice, are enclosed for your information.

Finally, we assume that you are representing TAS, Mr. Seegul, TITO, TI, and Mr. Herrod in this matter, and that this notice to you is as attorney for each of them. If this is not the case, please let us know immediately.

Sincerely,

James L. Weldon Jr
for

Thomas F. McBride
Director
Bureau of Enforcement

Enclosures

cc: Docket Section

in the development of an international basic meteorological reporting network, including the establishment, operation, and maintenance of reporting stations on the high seas, in polar regions, and in foreign countries in cooperation with other governmental agencies of the United States and the meteorological services of foreign countries and with persons engaged in air commerce; (6) coordinate meteorological requirements in the United States in order to maintain standard observations, promote efficient use of facilities and avoid duplication of services unless such duplication tends to promote the safety and efficiency of air navigation; and (7) promote and develop meteorological science and foster and support research projects in meteorology through the utilization of private and governmental research facilities and provide for the publication of the results of such research projects unless such publications would be contrary to the public interest.

TITLE IX—PENALTIES [29]

CIVIL PENALTIES

Safety, Economic, and Postal Offenses

SEC. 901. [*72 Stat. 783, as amended by 76 Stat. 149, 88 Stat. 414, 2162, 49 U.S.C. 1471*] (a) (1) Any person who violates (A) any provision of title III, IV, V, VI, VII, or XII, or of section 1114, of this Act, or any rule, regulation, or order issued thereunder, or under section 1002(i), or any term, condition, or limitation of any permit or certificate issued under title IV, or (B) any rule or regulation issued by the Postmaster General under this Act, shall be subject to a civil penalty of not to exceed $1,000 for each such violation; except that the amount of such civil penalty shall not exceed $10,000 for each such violation which relates to the transportation of hazardous materials. If such violation is a continuing one, each day of such violation shall constitute a separate offense. The amount of any such civil penalty which relates to the transportation of hazardous materials shall be assessed by the Secretary, or his delegate, upon written notice upon a finding of violation by the Secretary, after notice and an opportunity for a hearing. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the violation committed and, with respect to the person found to have committed such violation, the degree of culpability, any history of prior offenses, ability to pay, effect on ability to continue to do business, and such other matters as justice may require. This subsection shall not apply to members of the Armed Forces of the United States, or those civilian employees of the Department of Defense who are subject to the provisions of the Uniform Code of Military Justice, while engaged in the performance of their official duties; and the appropriate military authorities shall be responsible for taking any

[29] Under this title, the penalties provided herein are applicable to violations of statutes or regulations administered by the Civil Aeronautics Board, the Secretary of Transportation, and the National Transportation Safety Board (see footnote 1, p. 1). Thus, whether a reference to "Board" means the "Civil Aeronautics Board" or the "National Transportation Safety Board" will depend upon whether the matters involved concern one or both of such agencies. As previously indicated, "Secretary of Transportation" is substituted for "Administrator", except where the context requires otherwise (see footnote 1, p. 1).

necessary disciplinary action with respect thereto and for making to the Secretary of Transportation* or Board, as appropriate, a timely report of any such action taken.

(2) Any such civil penalty may be compromised by the Secretary of Transportation* in the case of violations of titles III, V, VI, or XII, or any rule, regulation, or order issued thereunder, or by the Board in the case of violations of titles IV or VII, or any rule, regulation, or order issued thereunder, or under section 1002(i), or any term, condition, or limitation of any permit or certificate issued under title IV, or by the Postmaster General in the case of regulations issued by him. The amount of such penalty, when finally determined, or the amount agreed upon in compromise, may be deducted from any sums owing by the United States to the person charged.

Liens

(b) In case an aircraft is involved in such violation and the violation is by the owner or person in command of the aircraft, such aircraft shall be subject to lien for the penalty: *Provided*, That this subsection shall not apply to a violation of a rule or regulation of the Postmaster General.

CRIMINAL PENALTIES

General

SEC. 902. [*72 Stat. 784, as amended by 75 Stat. 466, 76 Stat. 150, 76 Stat. 921, 84 Stat. 921, 88 Stat. 410–411, 417, 88 Stat. 2105, 2162, 49 U.S.C. 1472*] (a) Any person who knowingly and willfully violates any provision of this Act (except titles III, V, VI, VII, and XII), or any order, rule, or regulation issued by the Secretary of Transportation* or by the Board under any such provision or any term, condition, or limitation of any certificate or permit issued under title IV, for which no penalty is otherwise provided in this section or in section 904, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be subject for the first offense to a fine of not more than $500, and for any subsequent offense to a fine of not more than $2,000. If such violation is a continuing one, each day of such violation shall constitute a separate offense.

Forgery of Certificates and False Marking of Aircraft

(b) Any person who knowingly and willfully forges, counterfeits, alters, or falsely makes any certificate authorized to be issued under this Act, or knowingly uses or attempts to use any such fraudulent certificate, and any person who knowingly and willfully displays or causes to be displayed on any aircraft, any marks that are false or misleading as to the nationality or registration of the aircraft, shall be subject to a fine of not exceeding $1,000 or to imprisonment not exceeding three years, or to both such fine and imprisonment.

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*See footnote 29, p. 77.

(2) A person commits "an offense", as defined in the Convention for the Suppression of Unlawful Seizure of Aircraft when, while aboard an aircraft in flight, he—

(A) unlawfully, by force or threat thereof, or by any other form of intimidation, seizes, or exercises control of, that aircraft, or attempts to perform any such act; or

(B) is an accomplice of a person who performs or attempts to perform any such act.

(3) This subsection shall only be applicable if the place of takeoff or the place of actual landing of the aircraft on board which the offense, as defined in paragraph (2) of this subsection, is committed is situated outside the territory of the State of registration of that aircraft.

(4) For purposes of this subsection an aircraft is considered to be in flight from the moment when all the external doors are closed following embarkation until the moment when one such door is opened for disembarkation, or in the case of a forced landing, until the competent authorities take over responsibility for the aircraft and for the persons and property aboard.

Investigations by Federal Bureau of Investigation

(o) Violations of subsections (i) through (n), inclusive, of this section shall be investigated by the Federal Bureau of Investigation of the Department of Justice.

Interference With Aircraft Accident Investigation

(p) Any person who knowingly and without authority removes, conceals, or withholds any part of a civil aircraft involved in an accident, or any property which was aboard such aircraft at the time of the accident, shall be subject to a fine of no less than $100 nor more than $5,000, or imprisonment for not more than one year, or both.

VENUE AND PROSECUTION OF OFFENSES

Venue

SEC. 903. [*72 Stat. 786, as amended by 75 Stat. 467, 88 Stat. 411–413, 49 U.S.C. 1473*] (a) The trial of any offense under this Act shall be in the district in which such offense is committed; or, if the offense is committed out of the jurisdiction of any particular State or district, the trial shall be in the district where the offender, or any one of two or more joint offenders, is arrested or is first brought. If such offender or offenders are not so arrested or brought into any district, an indictment or information may be filed in the district of the last known residence of the offender or of any one of two or more joint offenders, or if no such residence is known the indictment or information may be filed in the District of Columbia. Whenever the offense is begun in one jurisdiction and completed in another, or committed in more than one jurisdiction, it may be dealt with, inquired of, tried, determined, and punished in any jurisdiction in which such offense was begun, con-

tinued, or completed, in the same manner as if the offense had been actually and wholly committed therein.

Procedure in Respect of Civil Penalties

(b)(1) Any civil penalty imposed under this Act may be collected by proceedings in personam against the person subject to the penalty and, in case the penalty is a lien, by proceedings in rem against the aircraft, or by either method alone. Such proceedings shall conform as nearly as may be to civil suits in admiralty, except that either party may demand trial by jury of any issue of fact, if the value in controversy exceeds $20, and the facts so tried shall not be reexamined other than in accordance with the rules of the common law. The fact that in a libel in rem the seizure is made at a place not upon the high seas or navigable waters of the United States shall not be held in any way to limit the requirement of the conformity of the proceedings to civil suits in rem in admiralty.

(2) Any aircraft subject to such lien may be summarily seized by and placed in the custody of such persons as the Board or Secretary of Transportation* may by regulation prescribe, and a report of the cause shall thereupon be transmitted to the United States attorney for the judicial district in which the seizure is made. The United States attorney shall promptly institute proceedings for the enforcement of the lien or notify the Board* or Secretary of Transportation* of his failure to so act.

(3) The aircraft shall be released from such custody upon payment of the penalty or the amount agreed upon in compromise; or seizure in pursuance of process of any court in proceedings in rem for enforcement of the lien, or notification by the United States attorney of failure to institute such proceedings; or deposit of a bond in such amount and with such sureties as the Board or Secretary of Transportation* may prescribe, conditioned upon the payment of the penalty or the amount agreed upon in compromise.

(4) The Supreme Court of the United States, and under its direction other courts of the United States, may prescribe rules regulating such proceedings in any particular not provided by law.

Procedure in Respect of Penalty for Aircraft Piracy

(c)(1) A person shall be subjected to the penalty of death of any offense prohibited by section 902(i) or 902(n) of this Act only if a hearing is held in accordance with this subsection.

(2) When a defendant is found guilty of or pleads guilty to an offense under section 902(i) or 902(n) of this Act for which one of the sentences provided is death, the judge who presided at the trial or before whom the guilty plea was entered shall conduct a separate sentencing hearing to determine the existence or nonexistence of the factors set forth in paragraphs (6) and (7), for the purpose of determining the sentence to be imposed. The hearing shall not be held if the Government stipulates that none of the aggravating factors set forth

*See footnote 29, p. 77.

§ 302.704 Action on petition or complaint.

If the Board is of the opinion that a petition or complaint does not state facts which warrant an investigation or action on its part, it may dismiss such petition or complaint without hearing. If the air carrier complained against shall not satisfy the complaint and there shall appear to be any reasonable ground for investigating the complaint, the Board shall investigate the matter complained of.

§ 302.705 Hearing.

In the event a hearing is ordered by the Board, Subpart A of this part shall govern the proceeding.

Subpart H—Rules Applicable to Compromise of Civil Penalties and Seizure of Aircraft

§ 302.800 Applicability of this subpart.

This subpart sets forth the special rules applicable to (a) procedures pursuant to section 901(a)(2) of the Federal Aviation Act of 1958, as amended, for the compromise of civil penalties provided for in section 901(a)(1), for the violation of any provision of Title IV (Air Carrier Economic Regulation) of the Act, or any rule, regulation or order issued thereunder; under section 1002(i) (Power to Establish Through Air Transportation Service); or any term, condition or limitation of any permit or certificate issued under Title IV; and (b) procedures pursuant to section 903(b) of the Act applicable to the seizure of aircraft involved in a violation and subject to a lien, pursuant to section 901(b) of the Act, for penalties for which the owner or person in command of such aircraft may be liable for any of the foregoing violations.

§ 302.801 Initial proposal to compromise.

Whenever the Director of the Bureau of Enforcement has information as to a possible violation for which the imposition and compromise of civil penalties is authorized by section 901 of the Federal Aviation Act of 1958, as amended, he may propose compromise of the civil penalties that might be imposed for such violation by serving upon the alleged violator (hereinafter called "the respondent"), by registered or certified mail, a notice containing the information specified in § 302.802.

§ 302.802 Contents of notice of alleged violation.

A notice served pursuant to § 302.801 shall state:

(a) The provisions of the Act, rule, regulation, order, or term, condition or limitation of the permit or certificate deemed violated, and a statement of the acts or omissions deemed to constitute such violations;

(b) The provisions of sections 901 and 903 of the Federal Aviation Act of 1958, as amended;

(c) The maximum civil penalities for which the violator may be liable pursuant to section 901 in accordance with the information that the Director then has; and

(d) The time within which an answer to the notice may be filed. A copy of this subpart (Subpart H) shall also be furnished with the notice.

§ 302.803 Answer to notice of alleged violation.

(a) An answer may be filed by submitting or mailing it to the Director, Bureau of Enforcement, Civil Aeronautics Board, Washington 20428, D.C., within 15 days of receipt of the notice, or within such different time as may be specified in the notice or permitted by the Director upon a request for extension of time to file the answer. Answers shall be deemed filed only upon actual receipt by the Board.

(b) If an answer is not timely filed, the Board may refer the matter to the United States Attorney for institution of a civil action to collect the statutory civil penalty in accordance with the provisions of section 903 of the Act, or take such other or additional action as it may deem desirable.

§ 302.804 Contents and subscription of answer.

(a) The answer should contain all relevant facts, data, or arguments which the respondent wishes to submit in order to demonstrate that he has not committed the violations charged, or that such violations took place under mitigating circumstances. The respondent may also submit any other pertinent matter in explanation.

(b) The answer shall be signed by the party filing the same or by a duly authorized officer or the attorney-at-law of record of such party. The signature of the person signing the answer constitutes

a certification that he has read the answer; that to the best of his knowledge, information and belief every statement contained therein is true; and that no such statements are misleading.

§ 302.805 Action upon receipt of answer.

The Board will consider all material timely submitted in accordance with §§ 302.803 and 302.804, and will take appropriate action as follows:

(a) If the Board determines that the alleged violations have not been committed or that the nature of the alleged violations does not warrant the imposition of civil penalties, it may close the case, without prejudice to the institution of new or other proceedings, and if appropriate the Board may issue a letter of reprimand.

(b) If the Board determines that civil penalties should be imposed, and that it would be appropriate to compromise such civil penalties, it may issue a notice of willingness to compromise in accordance with § 302.806.

§ 302.806 Contents of notice of willingness to compromise.

A notice of willingness to compromise shall advise the respondent:

(a) That the Board has determined on the basis of the materials submitted and other information that violations appear to have been committed, and shall specify such violations.

(b) That the Board has determined that the commission of such violations warrants the imposition of civil penalties pursuant to section 901(a) of the Federal Aviation Act of 1958, as amended, and shall indicate the extent of the penalties to which the respondent may be liable under that section for such violations.

(c) That the Board in accordance with section 901(a)(2) is willing to compromise such civil penalties, and that it is proposed that a specified amount may be acceptable as compromise of such penalties.

(d) That if the respondent is willing to compromise the civil penalties on the basis of the proposed amount, he should within 15 days make an offer of compromise in writing, accompanied by a check made payable to the Treasurer of the United States, addressed or submitted to the Director of the Bureau of Enforcement, and that if the offer is accepted, it would be in full settlement of the civil penalties for the violations charged.

(e) That the respondent is not required to make an offer of compromise.

(f) That if the civil penalties are not compromised, the Board may take steps to collect the statutory civil penalty by court action pursuant to section 903(b) of the Act.

§ 302.807 Acceptance of an offer of compromise.

Upon receipt of a written offer of compromise of civil penalties from a respondent, accompanied by a check in the full amount proposed in the notice of willingness to compromise, the Board may accept such offer as full settlement of civil penalties for the violations set forth in the notice of willingness to compromise. An offer of compromise may be withdrawn by the respondent at any time prior to its final acceptance; and any proposal for compromise shall not preclude the Board from suggesting a different or higher basis of compromise, or of seeking the collection of the maximum statutory civil penalties by court action, at any time prior to such final acceptance. The respondent will be promptly notified of the acceptance of his offer of compromise, and that such acceptance shall constitute full satisfaction of the civil penalties for the violations set forth in the notice of willingness to compromise. If the offer of compromise is not accepted by the Board, the check shall be promptly returned to the respondent, together with a notification of the action taken.

NOTE: In § 385.22(b), the Board has delegated authority to the Director of the Bureau of Enforcement to compromise civil penalties imposed for economic violations.

§ 302.807a Confidentiality of documents submitted in civil penalty proceedings.

Any document submitted to the Board by a respondent in a civil penalty proceeding instituted pursuant to this Subpart H shall be automatically withheld from public disclosure until the date on which the Board terminates the civil penalty proceeding, by acceptance of an offer of compromise or otherwise, if a request to withhold such document is made by the respondent no later than the time when such document is submitted to the Board. If respondent believes that further withholding, beyond the date on which the civil penalty pro-

ceeding shall be terminated, is necessary in order to obviate any adverse effect upon his interests, respondent must request further withholding from public disclosure. Such request, which must also be filed no later than the time the affected document is submitted to the Board, must comply with the requirements of Rule 39(d) of this part relating to identification of the information sought to be withheld and must provide reasons legally sufficient to support withholding the information under section 1104 of the Act. The Board will dispose of this request at the time it terminates the civil penalty proceeding, by acceptance of the offer of compromise or otherwise.

§ 302.808 Seizure of aircraft.

(a) Under sections 901 and 903 of the Federal Aviation Act of 1958, as amended (49 U.S.C. 1471, 1473), a Federal, State or local law enforcement officer, or a Federal Aviation Administration safety inspector, may, upon an authorization from the Civil Aeronautics Board specifying the reasons therefor, summarily seize an aircraft that is involved in a violation committed by the owner or person in command for which a civil penalty may be imposed for violations of Title IV or any rule, regulation or order issued thereunder, or under section 1002 (i), or any term, condition or limitation of any permit or certificate issued under Title IV. Such authorization may be issued at such time and in such manner as the Board deems appropriate, and irrespective of whether other procedures under this Subpart H are pending or proposed.

(b) Each person seizing an aircraft under this section shall place it in the nearest available and adequate public storage facility in the judicial district in which is was seized.

(c) The Board shall without delay send a written notice and a copy of this regulation to the registered owner of the seized aircraft and to each other person known to have an interest therein, including any air carrier or foreign air carrier involved in the violation, stating the—

(1) Time, date, and place of seizure;

(2) Name and address of the custodian of the aircraft;

(3) Reasons for the seizure, including the violations believed, or judicially determined, to have been committed; and

(4) Amount that may be tendered as—

(i) A compromise of a civil penalty for the alleged violation; or

(ii) Payment for a civil penalty imposed by a Federal court for a proven violation.

(d) The Board shall immediately send a report to the United States District Attorney for the judicial district in which the aircraft was seized, requesting him to institute proceedings to enforce a lien against the aircraft.

(e) The Board shall direct the release of a seized aircraft whenever—

(1) The alleged violator pays a civil penalty or an amount agreed upon in compromise, and the costs of seizing, storing, and maintaining the aircraft;

(2) The aircraft is seized under an order of a Federal court in proceedings in rem to enforce a lien against the aircraft, or the United States Attorney for the judicial district concerned notifies the Board that he refuses to institute those proceedings; or

(3) A bond in the amount and with the sureties prescribed by the Board is deposited, conditioned on payment of the penalty, or the compromise amount, and the costs of seizing, storing, and maintaining the aircraft.

Subpart I—Rules Applicable to Route Proceedings Under Sections 401 and 402 of the Act

General Provisions

§ 302.901 Applicability.

This subpart sets forth the special rules applicable to proceedings for conferment and/or modification of route authority under sections 401 and 402 of the Federal Aviation Act of 1958. For information as to other applicable rules, reference should be made to Subpart A of this part, to the Federal Aviation Act and to the substantive rules (see Parts 201 and 211 of the Economic Regulations as to the form of applications) and orders of the Board.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

UNITED STATES TOUR OPERATORS ASSOCIATION, ET AL. Plaintiffs-Appellees - against - TRANS WORLD AIRLINES, INC. ET AL. Defendants-Appellants	:	Docket Nos. 77-7134, 41

AFFIDAVIT OF SERVICE BY MAIL

Washington, D.C. ss:

Robert M. Beckman being duly sworn, deposes and says that he is over the age of eighteen years. That on the 7th day of June, 1977, he served the within Petition For Rehearing of Appellants, Travellers Air Services, Inc., and Travellers International Tour Operators, Inc., upon the following:

Harold L. Warner, Jr.
30 Rockefeller Plaza
24th Floor
New York, New York 10021
Attorney for the Defendant
Trans World Airlines

Arthur J. Galligan
Dickstein, Shapiro & Morin
10th Floor
2101 L. Street, N.W.
Washington, D.C. 20037
Attorney for the plaintiffs
United States Tour Operators
Association, et al.

and

Nathaniel L. Gerber
Assistant United States Attorney
U.S. Department of Justice
Southern District of New York
One St. Andrew's Plaza
New York, New York 10007

by depositing true copies of the same securely enclosed in a post-paid wrapper in the Mail Chute maintained and exclusively controlled by the United States at 1001 Connecticut Avenue, Washington, D.C. directed to those designated above.

Robert M. Beckman

Subscribed and Sworn to before
me this 7th day of June, 1977

Notary Public
District of Columbia

My Commission Expires December 31, 1978